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No. 97-376

IN THE

Supreme Court of the United States

October Term, 1997

WARREN PUBLISHING, INC.,
Petitioner,

v.

MICRODOS DATA CORP., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF INFORMATION INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Information Industry Association ("IIA"), a not-for-profit national trade association established in 1968 and representing the interests of domestic and international information content providers, respectfully moves for leave to file the attached brief *amicus curiae* in this copyright infringement case.* The consent of the attorney for petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

IIA represents over 550 companies involved in the creation and delivery of information products and services. These

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* IIA's membership list is contained in the Appendix hereto.

companies range from large publishing concerns to small businesses to sole proprietors. Many of IIA's members produce databases which require a great deal of creative, financial and human resources to organize, compile and produce. These information products are efficiency-enhancing resources to the economy. They provide specialized information for business, education and consumer uses, which is essential in promoting global competition in the evolving information age.

The information industry has become an important sector of the U.S. economy, and creatively selected and arranged compilations of data -- particularly electronic databases -- have proven to be essential to the success of the growing information marketplace. Database providers represented by IIA rely on copyright law as a key element in the protection required to help assure the opportunity for a fair return on their investments in the creative compilations they produce, and as an incentive for the creation of new databases and the maintenance of the accuracy and currency of existing databases. The national uniformity of copyright law is a critical requirement that enables these providers to serve national (and international) markets efficiently and competitively. The advent of the Internet, which knows no geographic boundaries, intensifies the need for copyright law to be applied in a uniform fashion. The Eleventh Circuit's decision, *Warren Publishing, Inc. v. Microdos Data Corp.*, 115 F. 3d 1509 (11th Cir. 1997), encroaches upon this national uniformity and threatens to lessen the incentive for database providers to continue making their works widely available.

The petition in this case raises issues of the scope and application of this Court's seminal decision on copyright protection for compilations, *Feist Publications Inc. v. Rural Telephone Services Co., Inc.*, 499 U.S. 340 (1991). It also

addresses important questions of the interpretation and application of the exclusions from copyright protection set forth in Section 102(b) of the Copyright Act, 17 U.S.C. §102(b), and seeks the resolution of conflicts between the circuits. The thoughtful resolution of all these issues is vital both to the database industry that IIA represents, and to the businesses, researchers and consumers who depend upon it.

The participation of IIA as *amicus curiae* at this stage will assist the Court in evaluating the arguments presented in support of, and in opposition to, the petition, particularly in terms of the practical impact of the decision below upon a dynamic and growing sector of the U.S. economy. In IIA's view, the Court should grant the petition and hear this case for five principal reasons, which are set forth in more detail in the accompanying Brief:

1. The decision below misapplied this Court's unanimous decision in *Feist* with regard to the standard of originality required to qualify a compilation of factual data for copyright protection. As a result, contrary to Congress' intent and to this Court's precedent, the Eleventh Circuit denied copyright protection to a commercially useful compilation that features a selection, coordination and arrangement of data heretofore unknown in the cable television industry market which petitioner serves.

2. The decision below misinterpreted Section 102(b) of the Copyright Act when it denied copyright protection to petitioner's compilation on the ground that it constituted an unprotectible "system." This holding is flatly inconsistent with the well-recognized distinction between an unprotectible system and its copyrightable expression.

3. The decision below misinterpreted the merger doctrine of copyright law, also codified in Section 102(b) of the Copyright Act, in such a way as to virtually deny copyright

protection to any commercially significant compilation of data, in contravention of the intent of Congress and the decision of this Court in *Feist*.

4. The decision below incorrectly treated commercial usefulness as a bar to copyrightability, contrary to almost a century of well-established copyright doctrine.

5. The decision below reflects a split among the circuits, since the Eleventh Circuit stands virtually alone in its excessively restrictive approach to compilation copyright. The petitioner's compilation would almost certainly have been accorded copyright protection had this case arisen in another circuit.

Letting this precedent stand will surely dampen incentives for investment in database development and innovation, with clear negative consequences for the growing sector of businesses, professionals, researchers and consumers who increasingly rely upon these products to meet their information needs. Denial of the petition will also perpetuate the circuit split and thus the regional balkanization of copyright law in this critical, complex area so important to the national economy.

As an association representing the leading database providers in the nation, IIA is in a unique position to articulate to the Court the viewpoint of a major sector of the nation's economy that the Eleventh Circuit's decision will adversely impact. IIA is well situated to assist the Court in understanding the broad policy and business implications of this case.

IIA's brief focuses on these legal and policy issues. We respectfully request that the Court grant IIA's motion and that its brief be considered by the Court in conjunction with the petitioner's request for a grant of writ of certiorari.

Respectfully submitted,

/s/ Steven J. Metalitz

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BRIEF AMICUS CURIAE OF INFORMATION INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE[1]

The interest of *amicus curiae* is set forth in the foregoing motion.

SUMMARY OF THE ARGUMENT

If left undisturbed, the decision below could have a serious detrimental impact on the database industry and on the broader information sector that depends upon copyright protection for original compilations and for other works of authorship. It

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[1] No counsel for any party had any role in authoring this brief, and no person other than the named amicus and its counsel made any monetary contributions to its preparation.

denies copyright protection to precisely those compilations -- comprehensive, logically organized, practically useful databases -- that have both the greatest potential commercial viability and value, and require the greatest sustained investment of creative, human and financial resources in order to produce, distribute and maintain.

This case also exemplifies a split among the circuits on the approach to compilation copyright in the wake of this Court's seminal decision in *Feist Publications Inc. v. Rural Telephone Services Co., Inc.*, 499 U.S. 340 (1991). In the decision below, the Eleventh Circuit in effect held that for fact-based works, creativity at the level of selecting the categories within which information will be arranged in a compilation is insufficient as a matter of law to support copyrightability. By contrast, the Second and Fifth Circuits have held precisely to the contrary: that creativity in the selection of categories of information to be published can suffice to meet the originality threshold for copyrightability. *See, e.g., Engineering Dynamics, Inc. v. Structural Software, Inc.*, 26 F. 3d 1335 (5th Cir. 1994), *opinion supplemented on denial of rehearing*, 46 F.3d 408 (5th Cir. 1995); *Kregos v. Associated Press*, 937 F. 2d 700 (2d Cir. 1991); *Key Publications, Inc. v. Chinatown Today Pub. Enterprises, Inc.*, 945 F. 2d 509 (2d Cir. 1991). Furthermore, the Eleventh Circuit has misinterpreted Section 102(b) of the Copyright Act and the merger doctrine of copyright law also codified in Section 102(b) and has incorrectly treated commercial usefulness as a bar to copyrightability. All these holdings directly conflict with recent decisions of the Second Circuit.

The decision below has grave implications for providers of databases and other compilations and for the public which benefits from the creation and dissemination of such works. By adopting a standard of originality that is far more demanding

than *Feist* contemplated or than other courts of appeal have applied, the Eleventh Circuit has created profound uncertainty about the scope of protection afforded information products and services. This is especially troublesome as the advent of electronic commerce ushers in an age where creative compilations of data can be easily copied and sent instantaneously across domestic and international borders. The Supreme Court should hear this case in order to clarify the minimal standard of originality articulated in *Feist,* reaffirm that originality in categorical selection and arrangement suffices for copyright protection, and resolve the split among the circuits.

I. THE ELEVENTH CIRCUIT IMPOSED A STANDARD OF ORIGINALITY ON WARREN'S FACTBOOK THAT IS INCONSISTENT WITH THE STANDARD OF ORIGINALITY FOR COMPILATIONS ARTICULATED BY THE SUPREME COURT AND OTHER CIRCUITS.

The decision below misapplied this Court's unanimous decision in *Feist* with regard to the standard of originality required to qualify a compilation of factual data for copyright protection. As a result, contrary to Congress' intent and to the Court's precedent, the Eleventh Circuit denied copyright protection to a commercially useful compilation that features a selection, coordination and arrangement of data heretofore unknown in the cable television industry market which petitioner serves[2].

The Supreme Court addressed the originality requirement for compilations in *Feist.* "Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that

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[2] The facts and procedural history of this case are set forth in the Statement of the Case offered by the Petitioners.

it possess at least some minimal degree of creativity." *Feist*, 499 U.S. at 345, citing 1 M. Nimmer & D. Nimmer, Copyright §§ 2.01 [A], [B] (1990). Furthermore, "the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be." *Id.*, citing Nimmer, §1.08[C][1].

Most courts, both before and after *Feist*, have denied copyrightability to only the most banal of works, *See, e.g., Victor Lalli Enterprises, Inc. v. Big Red Apple, Inc.*, 936 F. 2d 671 (2d Cir. 1991) (copyright protection denied to chart of horse racing statistics arranged according to purely functional grids with no opportunity for variation); *Sem-Torq, Inc. v. K-Mart Corp.*, 936 F. 2d 851 (6th Cir. 1991) (no originality found in plastic lettered "For Rent"/"For Sale" signs compiled in a set); *Mid America Title Co. v. Kirk* , 59 F. 3d 719 (7th Cir. 1995) (real estate title commitment lacks requisite originality since selection of preexisting factual information was not a matter of personal taste but a matter of convention and strict industry standards).

Many courts have applied the *Feist* standard to find originality (and hence, copyright protection) in compilations of data. *See, e.g., Engineering Dynamics, Inc. v. Structural Software, Inc.*, 26 F. 3d 1335, 1343-44 (5th Cir. 1994) (input and output formats of user interface program protectible under copyright); *CCC Information Services, Inc. v. Maclean Hunter Market Reports* 44 F. 3d 61, 67 (2d. Cir. 1994) ("*CCC Information*") (publisher's predictions of values of used cars based on variety of informational sources and professional judgment sufficiently original to warrant copyright protection); *Kregos v. Associated Press*, 937 F. 2d 700, 705 (2d Cir. 1991) ("*Kregos*") (selection of nine statistics for inclusion in baseball pitching form demonstrates sufficient originality); *Key*

Publications, Inc. v. Chinatown Today Publishing Enters., Inc. 945 F. 2d 509, 514 (2d Cir. 1991) (*"Key"*) (yellow pages tailored to local Chinese-American community entailed sufficient originality in selection).

Apparently alone among the courts of appeal, the Eleventh Circuit has adopted a standard of originality more rigorous than that spelled out in *Feist*. The divergence occurs not in the first prong of the originality test -- whether the work was independently created by the author (as opposed to copied from other works) -- but rather in what constitutes "at least some minimal degree of creativity." *Feist,* 499 U.S. at 345. The Eleventh Circuit's misunderstanding of "creativity" not only thwarts the uniformity which the Constitution and the Copyright Act seek to preserve, but threatens the growth of the information industry.

The Eleventh Circuit's deviation from the path marked by *Feist,* and subsequently followed by the other courts of appeal, was evident as early as its *en banc* decision in *BellSouth Advertising & Publishing Corporation v. Donnelly Information Publishing, Inc.*, 999 F. 2d 1436 (11th Cir. 1993), which reached a result contrary to *Key* with respect to copyright protection for a yellow pages directory. [3] The decision below

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[3] In assessing the divergent approaches of the Second and Eleventh Circuits involving the copyrightability of yellow pages directories, one author described the Second Circuit's decision in *Key* as adopting an original elements test, which focuses on whether there is a particular original element in the directory -- whether it be a creative selection of businesses or arrangement of a directory in several different categories. By comparison, the Eleventh Circuit's decision in *BellSouth*, adopts a "general format" test, which bases a finding of originality on the uniqueness of the format. Ethan L. Wood, Note, *Copyrighting the Yellow Pages: Finding Originality in Factual Compilations*, 78 Minn. L. Rev. 1319 (1994).

represents the culmination of this deviation. It seems that under the Eleventh Circuit's view, creativity at the level of selecting the categories or headings to be included can never be sufficiently original to support copyright, regardless of how the compiler selected the headings and arranged the information under them. *See id.* at 1440-1442.

As the Second Circuit articulated in *CCC Information*, the "thrust of the Supreme Court's ruling in *Feist* was not to erect a high barrier of originality requirement. It was rather to specify, rejecting . . . 'sweat of the brow,' that some originality is essential to the protection of authorship, and that the protection extends only to those original elements." *CCC Information,* 44 F.3d at 66. Recognizing this modest threshold, the Second Circuit has afforded copyrightability to compilations which exhibit some editorial judgment in the selection of categories of data to be published.

Warren's acts of selection, as comprehensively cataloged in the dissent to the decision below, *Warren Publishing, Inc. v. Microdos Data Corp.,* 115 F. 3d 1509, 1522-23 (11th Cir. 1997) (Godbold, J., dissenting), clearly surpassed the low threshold set by *Feist.* The *Feist* test does not demand a high level of creativity. Indeed, "it does not require that facts be presented in an innovative or surprising way." *Feist*, 499 U.S. at 361. Nor does it require that the arrangement and selection of facts be novel or unique. *Id.* at 358. However, Warren's acts of selection satisfied even more rigorous criteria. Warren used its principal community system to present facts in a way that was unknown in the industry at the time. Warren's database was entirely atypical from the prevailing industry standard. It was not, as was the white pages directory in *Feist*, "of the garden variety, devoid of even the slightest trace of creativity." *Id.* at 362. By lumping the compilation in this case with the non-copyrightable directory in *Feist*, the court below

strayed so far from the course set by this Court and followed by other circuits as to require this Court's review and correction.

II. THE ELEVENTH CIRCUIT'S INTERPRETATION OF SECTION 102(B) OF THE COPYRIGHT ACT IS INCONSISTENT WITH THAT OF THE SECOND AND EIGHTH CIRCUITS AND CONTRARY TO THE INTENT OF CONGRESS.

Relying on the district court's conclusion that Warren's principle for selecting and arranging information was a "system," the circuit court determined that the plain meaning of Section 102(b) bars the protection of such a "system." Under the Eleventh Circuit's reasoning, any compilation or original work of authorship whose creativity can be categorized as a system is deprived of copyright protection even if the application of that system results in wholly original expression. This fundamentally misconstrues Section 102(b) and the idea/expression dichotomy which it codifies.

Section 102(b) states that:

> In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work. 17 U.S.C. §102(b).

This section represents a codification of the idea/expression dichotomy originally articulated by this Court in *Baker v. Selden*, 101 U.S. 99 (1879), which stated that copyright protection does not extend to ideas; it protects only the original expression of those ideas employed by the author. Professor Nimmer makes the point succinctly:

> Thus, if a given 'procedure' is reduced to written form, this will constitute a protectible work of authorship, so as to preclude the unlicensed copying of 'the expression' of

> the procedure, even if the procedure *per se* constitutes an unprotectible 'idea.' Therefore, although Section 102(b) denies that copyright may 'extend to' an 'idea, procedure, process, etc.,' as contained in a given work, it does not deny copyright to a work merely because that work consists of an 'idea, procedure, process, etc.' Melville B. Nimmer and David Nimmer, Nimmer on Copyright §2.03[D], at 2-35 (1996).

The specific issue of whether a "system" is *per se* uncopyrightable under Section 102(b) was addressed by the Eighth Circuit in *Toro Company v. R & R Products Co.,* 787 F. 2d 1208 (8th Cir. 1986). Like the appellees in the instant case, the appellees in *Toro* argued that Toro's parts numbering system for lawn mower replacement parts was an uncopyrightable "system" under Section 102(b) of the Copyright Act. The district court agreed and granted appellee's motion to dismiss the appellant's copyright infringement claim, finding that Section 102(b) precluded copyright protection for such systems. The circuit court, while affirming the dismissal on other grounds, disapproved the trial court's Section 102(b) analysis. "All that the idea/expression dichotomy embodied in §102(b) means in the parts numbering context is that appellant could not copyright the idea of using numbers to designate replacement parts. Section 102(b) does not answer the question of whether appellant's particular expression of that idea is copyrightable." *Toro,* 787 F. 2d at 1212.

The Eleventh Circuit ignored this distinction. It held that "even if Warren . . . [did] . . . employ a system to select communities to be represented in the book, then section 102(b) of the Act bars the protection of such a system." *Warren Publishing,* 115 F. 3d at 1517. This finding evinces a fundamental misunderstanding of the idea/expression

dichotomy, an error that inevitably shrinks the field of copyrightable compilations to the vanishing point.

Decisions after *Feist* have understood that the use of a principle of selection is the *sine qua non* of most compilations. As the Second Circuit recognized in *CCC Information*, the original element of the majority of compilations will most often be the categorizing principle or system. *See CCC Information,* 44 F. 3d at 70. However, the Eleventh Circuit's approach would eviscerate Congress' intent to provide protection for compilations under Section 103 by categorizing the expression resulting from the application of the categorizing principle as an unprotectible "system."

Under the Eleventh Circuit's logic, the vast majority of compilations will not be entitled to copyright protection, an outcome directly contrary to the expectations of this Court in *Feist. See Feist,* 499 U.S. at 358-59. Section 102(b) does not bar copyright protection for the expression of Warren's system, which was illustrated in its principal/lead community format.

III. THE ELEVENTH CIRCUIT'S APPLICATION OF THE MERGER DOCTRINE IS INCONSISTENT WITH THE APPROACH TAKEN BY THE SECOND CIRCUIT AND CONTRAVENES THE INTENT OF CONGRESS TO AFFORD COPYRIGHT PROTECTION TO COMPILATIONS.

The decision below misinterpreted the merger doctrine of copyright law, also codified in Section 102(b) of the Copyright Act, so as to deny copyright protection to virtually any commercially significant compilation of data, in contravention

of the intent of Congress and in contradiction to the approach adopted by the Second Circuit.[4]

Under this basic tenet of copyright law, when the expression of an idea is inseparable from the idea itself, the expression and the idea "merge," and the expression will be unprotected to insure free public access to the idea. *CCC Information*, 44 F. 3d at 68, (Leval, J.), citing *Kregos,* 937 F. 2d at 705; *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F. 2d 738, 742 (9th Cir. 1971). However, the application of this doctrine to copyright in compilations has been a source of conflict among the circuits. Congress clearly intended to protect original compilations that will advance the progress of science and the useful arts, while the merger doctrine, if construed and applied expansively, could lead to the denial of protection to compilations whose underlying ideas can be expressed in only one or a few ways.

Under Section 103 copyright protection in compilations is limited to the author's original selection, coordination or arrangement of preexisting materials or data. However, as the Second Circuit has noted, "it is apparent that virtually any independent creation of the compiler as to selection, coordination, or arrangement will be designed to add to the usefulness or desirability of his compendium [and] . . . in the case of a compilation . . . such structural ideas are likely to be

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[4] The Eleventh Circuit has chosen to include the merger doctrine in its originality calculus. The Second Circuit, on the other hand, has recommended that it only be used when analyzing the substantial similarity between an alleged infringer's work and the copyright holder's work, rather than in analyzing the copyrightability of the original work, since in the former context it will provide a more realistic basis for evaluating the claim that protection of expression extends to the idea. *Kregos*, 937 F. 2d at 705. Nimmer comments that the Second Circuit's approach is the "better view." Nimmer, §13.03[B] at 13-76 to -78.

expressed in the most simple, unadorned and direct fashion." *CCC Information,* 44 F. 3d at 70.

The Second Circuit squarely addressed this problem in several cases. In *Kregos* the court noted that the inherent tension in the Copyright Act between the protection of creations that will advance knowledge and the need for public access to the ideas underlying the creations is especially acute in the case of compilations. *Kregos,* 937 F. 2d at 705. This is so because "in one sense, every compilation of facts can be considered to represent a merger of an idea with its expression. Every compiler of facts has the idea that his particular selection of facts is useful. If the compiler's idea is identified at that low level of abstraction, then the idea would always merge into the compiler's expression of it. Under that approach, there could never be a copyrightable compilation of facts." *Id.* at 706. The Second Circuit built upon this observation in *CCC Information* by stating that "given the nature of compilations, it is almost inevitable that the original contributions of the compilers will consist of ideas. Originality in selection . . . will involve the compiler's idea of the utility to the consumer of a limited selection from the particular universe of available data." *CCC Information,* 44 F. 3d at 70.

Recognizing the statutory and policy tensions, the Second Circuit deploys the doctrine not in the copyrightability inquiry, but at the infringement stage. Moreover, it applies a test which requires courts to distinguish between ideas which are infused with the personal taste and opinion of the author[5] and those which are essential to the understanding of phenomena or the

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[5] Examples would include the form used to predict the outcome of baseball games in *Kregos*, the telephone directory which only included businesses that the compiler believed to useful to the Chinese-American community in *Key,* or the price valuations in *CCC Information* which reflected the opinion of the author.

solving of problems.[6] Withholding application of the merger doctrine in cases involving the first category would not harm the policy underlying the rule that forbids granting protection to an idea. *CCC Information*, 44 F.3d at 71. The Second Circuit would more aggressively apply the merger doctrine in cases falling in the latter category since the ideas involved therein represent the "building blocks of understanding" and implicate to a greater extent the policy concerns of keeping such ideas in the public domain. *Id.* at 72-73.

In holding that there are very few ways -- if not only one way -- of expressing Warren's principal community system (which is driven by Warren's original conceptualization and definition of an organizing principle), the Eleventh Circuit has adopted an unbridled application of the merger doctrine. Its failure to distinguish selection criteria driven by subjective judgment from those which are purely functional brings it squarely into conflict with the Second Circuit, under whose jurisprudence the petitioner's compilation would almost certainly have been accorded copyright protection, despite the merger doctrine. Given the highly transitory nature of

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[6] Examples of ideas in this category include those which encompass building blocks of understanding or the solving of problems, such as a bookkeeping system, *see Baker v. Selden,* 101 U.S. 99 (1879), ideas or procedures for doing, making or building things, *see Kern River Gas Transmission Co. v. Coastal Corp.* 899 F. 2d 1458 (5th Cir.), *cert. denied,* 498 U.S. 952 (1990), or other concepts which undertake to explain phenomena or furnish solutions. *CCC Information,* 44 F. 3d at 72. As the Court in *CCC Information* noted, this distinction is reflected in the Copyright Office Circular 31 which states that "[c]opyright protection is not available for "ideas or procedures for doing, making, or building things; scientific or technical methods or discoveries; business operations or procedures; mathematical principles; formulas; algorithms; or any concept, process [or] method of operation." *CCC Information,* 44 F. 3d 72 n.22.

electronic commerce, the inherently national market it represents, and the growing importance of databases and other compilations to that market, the Court must resolve this conflict.

IV. THE CIRCUIT COURT INCORRECTLY HELD THAT COMMERCIAL USEFULNESS IS A BAR TO COPYRIGHT PROTECTION FOR COMPILATIONS

The Eleventh Circuit also found that Warren's organizing principle was a mere discovery driven by the needs of the market and thereby lacked the requisite originality for copyright protection. This finding conflicts with well-established copyright dctrine as well as with a recent holding of the Second Circuit.

In discussing the originality requirement for Warren's Factbook, the Eleventh Circuit noted that the "mere discovery of an organizing principle which is dictated by the market is not sufficient to establish creativity." *Warren Publishing,* 115 F. 3d at 1520 n.31. The Eleventh Circuit characterized Warren's unique organization of data as merely a decision to make the Factbook commercially useful." *Id.,* at 1518. It thus erected another bar to copyrightability of compilations by denying protection when a compiler develops a system of selection which responds to the needs of the market.

The decision below is in sharp conflict with the Second Circuit's holding that a finding of commercial usefulness does not negate originality. In *CCC Information,* the Circuit Court explicitly rejected the district court's finding that no originality was shown in the appellant's compilation since it only represented "a logical response to the needs of the vehicle valuation market." *CCC Information*, 44 F. 3d at 67. The Second Circuit recognized the "fact that an arrangement of data responds logically to the needs of the market for which the compilation was prepared does not negate originality. To the

contrary, the use of logic to solve the problems of how best to present the information is independent creation." *Id.* *CCC Information* is only the latest in a long line of copyright cases holding that commercial usefulness is not a consideration for determining original authorship. *See, e.g., Bleistein v. Donaldson,* 188 U.S. 239 (1903).

Information providers and compilation authors routinely tailor their products to the perceived needs of the marketplace, as did Warren. However, under the Eleventh Circuit's analysis, any new principle for organization or selection, no matter how original, would not be entitled to copyright protection if it arose from a motivation to make a database or other compilation "commercially useful." This circuitous reasoning would be fatal to claims of copyright in a wide range of works. Every successful work of authorship could arguably be said to be a response to a market need. Nevertheless, it is still the author who discovers this market niche, synthesizes it in his or her mind and reduces it to tangible form. Under the Eleventh Circuit's reasoning, however, these expressions would not be entitled to copyright protection since they arise from ideas which were already amorphously present in the marketplace, waiting to be discovered. The decision below fails to provide a rationale for this argument, nor does it take into account the practical implications that it would have for the information industry. The Court should take this opportunity to resolve the split between the Second and Eleventh Circuits and to clarify that commercial usefulness, since it is irrelevant to the determination of original authorship, cannot bar copyright protection in compilations or any other works.

V. THE ELEVENTH CIRCUIT'S RULING WILL REDUCE INCENTIVES FOR THE CREATION OF FACTUAL COMPILATIONS

In today's information society, predictable standards of copyright protection are essential to stimulate the inventiveness and creativity necessary to promote the free flow of information in commerce. Without copyright protection, creators of original databases and compilations lack incentive to create new or improved compilations and to maintain the accuracy and reliability of existing databases, for they are denied the full legal arsenal they need to combat piracy of their products and thus seek to achieve a reasonable return on their investments.

If this Court does not clarify the standard of originality in *Feist* as it has been interpreted by the Second and Fifth Circuits and correct the Eleventh Circuit's deviation from that standard, information providers will be faced with uncertainty on the level of protection in various jurisdictions.

As our nation continues to move from a manufacturing to an information services-based economy, the public and private sectors are becoming more dependent on the timely delivery of accurate and reliable data. Information providers expend a tremendous amount of resources and creativity in assembling and delivering useful compilations of data. Although many of these products are still delivered in hard copy to libraries, non-profit institutions and businesses, the advent of the Internet and online commerce portends an acceleration of the trend toward electronic delivery of information products and services. These technological advances leave these products even more vulnerable to unauthorized copying and distribution. If the Eleventh Circuit rule is allowed to stand, or if other circuits follow it, the resulting erosion of incentives means that the

prospects for achieving a robust online information marketplace will be significantly dimmed.

IIA recognizes that facts are not copyrightable. However, the Eleventh Circuit's ruling goes far beyond this maxim and permits -- indeed, invites -- competitors to take the original arrangement and selection of a work with impunity. This is certainly antithetical to the goal of the Copyright Clause -- to stimulate the creation of new works for the benefit of the public.

The Court should also remain mindful that due to the already thin copyright protection afforded compilations, compilers and information providers often rely upon private contracts to prevent piracy and enhance the prospects for a return on their investment. However, while helpful, contracts cannot substitute for copyright. "A copyright is a right against the world. Contracts, by contrast, generally affect only their parties; strangers may do as they please." *ProCD v. Zeidenberg,* 86 F. 3d 1447, 1454 (7th Cir. 1996). If copyright protection for compilations is further restricted by other courts which follow the Eleventh Circuit down the path away from the *Feist* originality standard, marketing methods for many information products would be drastically constrained. Establishing privity would become the paramount goal, so that contractual restrictions on use could be enforced. In this environment, the general public -- the intended ultimate beneficiary of the Copyright Clause -- could find its access to valuable compilations sharply reduced.

CONCLUSION

In order to resolve the conflicts between the Eleventh Circuit and courts of appeal in other circuits, and to ensure that the courts of appeal follow the guidelines articulated by this Court for the analysis of copyright protection for compilations, the Court should grant the writ that petitioners have requested.

Respectfully submitted,

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October 3, 1997

Appendix

Information Industry Association
Membership Roster

A.T. Kearney
Access Innovations, Inc.
ADIS International Inc.
Advanta Partners LP
AG Communications Systems
Alex Brown & Sons Incorporated
Alimansky Venture Group Inc.
Allied Marketing Group, Inc.
Alpine Meridian, Inc.
AMA CPT Intellectual Property
America Online, Inc.
American Banker/Bond Buyer
American Business Information
American Demographics, Inc.
American Health Consultants
American Stock Exchange
Amulet Inc.
Andersen Consulting Media & Entertainment Group
Architects First Source
AT&T
AT&T EasyCommerce Services
AT&T Global Information Solutions
AT&T HomePlace Services
AT&T Laboratories
AT&T Solutions Customer Care
AT&T WorldNet Services
Atlantic Accord
Australian Stock Exchange
Autex Systems Inc.
Aviation Week Group
Aviation/Aerospace Newsletter
The Baltimore Sun
Bancroft & Whitney
Bankers Trust Company
Barbados Investment & Development Corporation
Barclays Law Publishers
Barnard & Co., Inc.
Barron's National Business & Financial Weekly
Belden Associates
Benelytics, Inc.
Berkery, Noyes & Co.
Beta Systems Inc.
BioInformatics Publishing
BizNew$
BNA Communications Inc.
BNA International, Inc.
BNA ONLINE
Bolsa de Valores de Sao Paulo
BPI Electronic Media

Breakwater Holdings, LLC
BRIDGE Information Systems
BRIDGE News
Broadview Associates LLC
Brooks/Cole Publishing Company
Buckman Communications
The Bureau of National Affairs
Burrelle's/VMS NewsAlert
Business Network Inc.
Business Week Group
Byggfakta Gruppen A/S
BYTE
C.J. Tower, Inc.
Cahners Electronic Media - Industrial Group
Cahners Publishing Company
Cambridge Information Group
Cambridge Scientific Abstracts
Capital Idea, James Inc.
Carbo, Toni
CARCO GROUP INC.
Carfax, Inc.
The Carswell Company Limited
CBOE Trading Operations
CCH Incorporated
CCH Legal Information Services
CCH Washington Service Bureau
CDA Investment Technologies
CDB Infotek
Certech S.A.
Chapman and Hall
Charles E. Simon & Company
Charles Schwab Electronic
Chester Chronicle & Associated
Chicago Board of Trade Market Data Services
Chicago Mercantile Exchange/Market Data Services
CIDEX International, Inc.
Claritas, Inc.
CLARITECH Corporation
Clark Boardman Callaghan
Clearnet/The Morris Group
Commercial Information Systems
COMPASS Media, Inc.
Competitive Media Reporting
Compu-Mark (UK) Ltd.
Compu-Mark NV
COMTEX
Congressional Information Services
Congressional Quarterly, Inc.
Consolidated Film Industries

Construction Market Data Group
Continental Cablevision
Continental DataGraphics
Continental Engineering Services
Continental Graphics Group
Continental Graphics Holdings, Inc.
Coopers & Lybrand InfoCom Consulting Group
Copyright Research Group
Corporate Technology Information Services
Counterpoint Publishing, Inc.
Course Technologies
Cowles Simba Information
Creative Communications
Crossaig Limited
CS First Boston Corporation
CT Corporation
CUSIP Service Bureau
The Cyber Solutions Group
Data Communications
Data Control Corporation
Data Conversion Specialists
Data Downlink Corporation
Database Technologies, Inc.
Datapro Information Services
Datasource Reports
Delmar Publishers Inc.
DemoNet Online
Derwent Information LTD
Derwent North America
Desktop Data, Inc.
Digital Ink Company
Direct Marketing Technology
Disclosure Incorporated
Donaldson Lufkin & Jenrette
DonTech
Dow Jones & Company, Inc.
Dow Jones Broadcast
Dow Jones Business Information
Dow Jones Financial News Services
Dow Jones Information Services
Dow Jones Interactive Publishing
Dow Jones Markets
Dow Jones News Service
Dow Jones Telerate Canada Inc.
DRI/McGraw-Hill
DTN Financial Services
Dun & Bradstreet
EarthWeb
EBC Software Limited
Editora McGraw-Hill do Brasil
Edward Kaminski Associates
Electronic Information Group
Electronic Mail & Micro System
Electronic Settlements Group
Elsevier Science

Eugene Simonoff & Associates
Excalibur Technologies Corp.
Excerpta Medica, Inc.
Experian Information Solutions
Explore Information Service
F.W. Dodge
Faulkner & Gray
Faulkner Information Services
Federal Document Clearing House
Federal Filings Inc.
Federal Information & News Dispatch
Fidelity Investments
Fides Informatik
Financial Information, Inc.
Financial InterGroup Holdings
FIND/SVP, Inc.
First Call Corporation
First Data InfoSource
Focus Enterprises
Folio Corporation
Frames Data, Inc.
Furman Selz LLC
Gale Research
Gale Research International
Gardner, Carton & Douglas
GARI Software Associates
Garvey, Schubert & Barer
Genesys Partners, Inc.
Glass's Dealer's Guide
Global Finance Information
Globe Information Services
GlobalSource
Goldberg, Morton David
Government Counseling Ltd.
GrayFire Information Services
Greenhouse Associates
Greenwich Associates
Greenwood Publishing Group
GTE Card Services
GTE Corporation
GTE Data Services, Inc.
GTE Directories Corporation
GTE Education Services, Inc.
GTE Entertainment
GTE Information Services
GTE Laboratories, Inc.
GTE Mobilnet
GTE New Ventures
GTE Service Corporation
GTE Supply
GTE Telecommunication Services
GTE Telephone Operations
H. Donald Wilson LLC
The H.W. Wilson Company
Hambrecht & Quist LLC
Heinle & Heinle
Hinkley Enterprises
Horton, Forest W.
HotOffice Technologies, Inc.

HuebCore Communications Inc.
I.R.S.C., Inc.
IBM Canada Ltd.
IBM Corporation
IBM infoMarket
IDD Digital Alliance
IDD Information Services, Inc.
IFR Publishing
IHS Engineering Products Division
IHS Environmental Information
IHS Group, Inc.
ILX Systems Inc.
ITP School Publishing
Imark Technologies, Inc.
Individual, Inc.
Industry Information Group
Infomart Dialog Limited
Infonautics, Inc.
Information Access Company
Information America
Information Connectivity Group
Information Handling Services
Information Monitor Co., LLC
Information Resources Group
Information Strategists
Information Systems Management
Information Today, Inc.
Infosis Corporation
InfoTech, Inc.
The InfoWorks Group
Innovest First, Inc.
INSTINET CORPORATION
Institute for Scientific Information
Intell.X
Intelpro
Interactive Connection
Interactive Data
Interactive Market Systems
Interactive Video Enterprises
International Database Group
International Development Partners
International Thomson Business
International Thomson Distribution
International Thomson Organisation Ltd.
International Thomson Publishing Japan
International Thomson Publishing Services, Ltd.
International Thomson Transportation
Internet Financial Network
Internet Global Communications
Inventory Locator Service, Inc
The Investext Group

Investment Dealers' Digest
ITP School Publishing
J.J. Kenny Company Inc.
Jane's Information Group
JNANA
The Jordan, Edmiston Group
Journal of Commerce Limited
Kaplan Educational Center Ltd.
Keystone Venture Capital Management
Knight-Ridder Information, Inc
KnowledgeLink Corporation
KRT Business News
LAN Times
The Law Book Company Ltd.
Law Offices of J.L. Ebersole
LEGI-SLATE, Inc.
Lehman Brothers Inc.
LEXIS Document Services
Lexis-Nexis
Liberty Brokerage, Inc.
Linguistics International, Inc
Loan Pricing Corporation
Loftin Management Consulting Group
Logos Corporation
Lokalbogsforlaget A/S
London International Financial & Options Exchange
London Stock Exchange
LSW, Inc.
Lucier, Richard E.
Luntz, Suleiman & Associates
M.Power Corp.
MacRae's
Management Decisions
Manning & Napier Information
Markborough Development
Market Data Corporation
Market Data Retrieval
Market Guide Inc.
Marketing Resources Plus
Martell, Terrence F.
The Marx Group
McClure, Charles R.
The McGraw Hill Companies, Inc
McGraw-Hill Asia/Pacific Group
The McGraw-Hill Bookstore
McGraw-Hill Broadcasting
McGraw-Hill College Division
McGraw-Hill Construction
McGraw-Hill Financial
McGraw-Hill Health Care Publications
McGraw-Hill Information Services
McGraw-Hill Information System
McGraw-Hill Libri Italia, Srl
McGraw-Hill Professional Publishing Group

McGraw-Hill Publication Services
McGraw-Hill Ryerson
McKnight Medical Communication
MDL Information Systems
MEDEC Dental Communications
MediaStream, Inc.
Medical Economics
MedScape, Inc.
The MEDSTAT Group
Meridian Venture Partners
Merrill Lynch Asset Management
Merrill Lynch Capital Markets
Merrill Lynch Pierce Fenner & Smith
Merrill Lynch Securities Pricing Service
Meta4 Digital Design
Michie
MICROMEDEX, Inc.
Millileaf, Inc.
Mitchell International
Money Market Directories, Inc.
Moody's Investors Service
Morgan Stanley & Co. Inc.
Mosby Matthew Bender
The Moschovitis Group, Inc.
Mostrups Forlag A/S
Muller Data/TSIS
Municipal Market Data, Inc.
The Nasdaq Stock Market Trade Dissemination Services
National Auto Glass
National Software Testing Laboratories, Inc.
NCCI Information Services
NCR Canada Ltd.
Nelson Canada
Nelson English Language Teaching
Nelson Price Milburn Limited
NERAC, Inc.
New York Cotton Exchange
New York Mercantile Exchange
New York Stock Exchange, Market Data Division
New York Times Information Services
The New York Times Syndicate
Newcastle Chronicle & Journal
NewsBank, inc.
Newsday
NewsNet, Inc.
Newsweek, Inc.
NFER-Nelson
NIKKEI AMERICA/Databank
Noble, J. Kendrick
North Eastern Evening Gazette

Oakley, Robert L.
OASYS Global - UK
Official Airline Guides, Inc.
OKI Business Digital
OPEN - Ohio Professional Electronic Network
The Oryx Press
Osborne/McGraw-Hill
Oy Rakennusalan Projektitiedos
PaineWebber Inc.
Parnassus Associates International
The Parthenon Group
Pasha Publications
PC QUOTE, INC.
Perot Systems Corporation
PERQ Research Corporation
Personal Library Software, Inc
Peterson's
Phase 5 Consulting Group Inc.
Physicians' Online, Inc.
Pike & Fischer, Inc.
PLATT's/The Commodities Division
The Police Review Publishing
The Polk Company
PR Newswire Association, Inc.
Practitioners Publishing Co.
Prentice, Anne E.
Primary Source Media
Primis Custom Publishing
PRN Associates
Pro CD, Inc.
PsycINFO
Public Record Research Library
The Publishers' Consortium
PWS Publishing Company
QUAESTUS Management Corp.
Questel.Orbit, Inc.
Quotron Systems, Inc.
R.R. Bowker/Martindale-Hubbell
R.R. Donnelley Financial
R.S. Means Company, Inc.
Rapid Communications of Oxford
Rapid Patent Service
Reality Online, Inc.
Reed Elsevier plc
Reed Elsevier Technology Group
Reed Reference Publishing
Reed Technology & Information Services Inc.
Reed Telepublishing
Reed Travel Group
Research Information Systems
Research Institute of America
Response Communications
Retrieval Technologies, Inc.
Reuben H. Donnelley
Reuters America, Inc.

REUTERS Canada Ltd.
Reuters Limited
Reuters New Media Inc.
Reuters Sinapore Ptd. Ltd.
Reuters:file Ltd.
Robbin, Alice
Rotunda, Inc.
Routledge, Inc.
Russell Distributing Company
S&P Equity Investor Services
S&P MarketScope
S&P Ratings Group
Sage Information Services
Salomon Inc.
SandPoint Company
Sawabih Information Services
Scarborough Research Corp.
Schaum
The Scotsman Publications Ltd.
Securities Data Company
Securities Data Publishing
Securities Industry News
Securities Information Corp.
Securities Valuation Company
Shepard's/McGraw-Hill, Inc.
Sheshunoff Information Service
Signet Bank Media Communications Group
SilverPlatter Information, Inc
Smith Barney Inc.
Social Science, Inc.
Sociedad de Bolsas, S.A.
Softbank Net Solutions
Solbright, LLC
Soliton Associates
The Source Maythenyi, Inc.
Southam Building Reports
Southam City Newspapers
Southam Inc.
Southam Information & Technology
Southam New Media
Spectra-Market Metrics
Springhouse Corporation
Standard & Poor's Compustat
Standard & Poor's ComStock
Standard & Poor's Corporation/McGraw-Hill
Standard & Poor's Information
Star Data Systems Inc.
Stockalert, Inc.
Strategic Advantage, LLC
Sweet & Maxwell Ltd.
Sweets Group
Swiss Exchange
Sydney Futures Exchange Ltd.
Taiwan Stock Exchange Corp.
TASC, Processing Systems Group
Tax Management Inc.

TBG Information Investors, LLC
TCI Software Research
The TDA Group
TechNews, Inc.
Technical Data
Technimetrics, Inc.
tele.com
Telecommunications Reports
Telekurs USA Inc.
Teleres
Telesphere Corporation
TFS Ventures
Thomas Nelson & Sons Ltd.
Thomas Register Online
Thomson & Thomson
Thomson BankWatch
Thomson Business Information Group
Thomson Business Publishing
Thomson Corporate Publishing International
The Thomson Corporation
Thomson Directories, Ltd.
Thomson Electronic Settlements
Thomson Financial & Professional Publishing Group
Thomson Financial Database Group
Thomson Financial Information
Thomson Financial Services
Thomson Free Newspapers
Thomson Healthcare Communications
Thomson Information Resources
Thomson Information/Publishing Group
Thomson Institutional Services
Thomson Investment Software
Thomson Legal & Professional Publishing
Thomson Municipal Services
Thomson Newspapers Corporation
Thomson Newspapers Inc.
Thomson Publications Australia
Thomson Research Corporation
Thomson Securities Information
Thomson Technology Group
Thomson Trading Services
The Times Mirro Company
Toronto Stock Exchange
Tower Group International
Trade Data Reports, Inc.
Trade Dimensions
Transactions Marketing Inc.
Transport Technology Publishing
Trepp Financial

Trident Capital, Inc.
Turner Consulting Group
U S WEST Advanced Technologies
U S WEST Communications, Inc.
U S WEST Dex
U S WEST Enahnced Services
U S WEST Enterprises
U S WEST InterAct!
U S WEST International
U S WEST Marketing Resources
U S WEST Media Group-Strategy
U S WEST New Vector Group
U S WEST, Inc.
UMI
UMI/Data Courier
UMI/DataTimes Company
United Financial Services
Up-Set
Utility Data Institute
Valorinform
Van Nostrand Reinhold
Ventana Press
Ventresca, Marc J.
Veronis, Suhler & Associates, Inc.
VerticalNet, Inc.
Veterinary Medicine Publishing
VNU Marketing Information Services
Volt Directory Marketing
VS&A Communication Partners
Wadsworth Publishing Company
Wadsworth, Inc.
Wall Street Computer Review
The Wall Street Journal
Warren, Gorham & Lamont, Inc.
Washington Post Company/The
Waters Information Services
Wave Systems Corp.
WavePhore, Inc., Newscast Division
Weil, Ben
Wellington Management Co., LLP
West Group
Western Mail & Echo Ltd.
Wigand, Rolf T.
Winstar Telebase Inc.
World Aviation Directory
Xcitek, Inc.
Ziff-Davis Training & Support Publishing Group